83-617

No. _____

In The

Supreme Court of the United States

October Term, 1983

RICHARD WACHSMAN, DALLAS POLICE & FIRE ACTION COMMITTEE,

Petitioners,

vs.

CITY OF DALLAS; CHIEF, DALLAS POLICE DEPARTMENT; CHIEF, DALLAS FIRE DEPARTMENT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a municipality may constitutionally prohibit its employees or their associations from engaging in *nonpartisan* political activity, containing no substantial party involvement.

2. If so, whether a municipality, consistent with the First Amendment, may prohibit political activity of its employees which consists of making financial contributions to, endorsing, petitioning, and soliciting or receiving funds for candidates for office.

3. Whether a municipality may constitutionally prohibit employees or their associations from engaging in partisan political activity dealing with non-City elections in the face of the City's admission that "[a] prohibition of partisan activity would be of little significance to the City."

PARTIES BELOW

The caption of the case in this Court contains the names of all parties to the proceedings before the United States Court of Appeals for the Fifth Circuit.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Richard Wachsman and the Dallas Police & Fire Action Committee, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 2, 1983, with rehearing denied on June 29, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 704 F.2d 160, and is set forth in Appendix "A." The denial of rehearing is set forth in Appendix "B."

The opinion of the district court is set forth in Appendix "C."

JURISDICTION

The opinion of the Court of Appeals was handed down May 2, 1983. A timely petition for rehearing was denied on June 29, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this proceeding is the First Amendment to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This action requests injunctive relief against certain absolute restrictions imposed by the City of Dallas upon the political activities of the City's employees and their associations (R.I, 1-14). After preliminary proceedings in the district court, respondents sought leave to file their First Amended Answer which for the first time conceded that petitioners could engage in several limited forms of political activity (R.I, 89-92). Leave to file the answer was granted (R.I, 96), and the cause proceeded to trial on the merits. Thereafter, the district court entered its findings of fact and conclusions of law, holding violative of the first

amendment the respondents' attempts to restrict City employees from offering their individual endorsements or opinions of city council candidates to any group of more than fifteen people, when such group is not a convention, caucus, rally or similar gathering (R.I, 97-107). No other relief on the substantive issues was awarded by the trial court. The Fifth Circuit affirmed.

Petitioner Police & Fire Action Committee, of which petitioner Wachsman is a member, is the joint political committee of the Dallas Police Association and the Dallas Firefighters Association (R.II, 18). As a formal organization, the Committee represents some 3,000 police and fire personnel (R.II, 18).

Under existing City Charter provisions and personnel regulations the political activities of the Committee and of individual City employees are significantly restricted. Specifically, the Dallas City Charter provides that neither an employee association nor an individual employee may:

(a) publicly endorse city council candidates or organizations supporting such candidates;

(b) contribute, directly or indirectly, or through an organization, to city council candidates;

(c) circulate nominating petitions for city council candidates;

(d) actively support city council candi-

dates or organizations supporting such candidates;

(e) solicit or receive contributions for city council candidates or for partisan political campaigns.

Additionally, employees such as Wachsman may not manage a partisan political campaign.[1] The City of Dallas is a home rule municipal corporation existing by virtue of Texas law, operating with a council-manager form of government. Dallas Charter, Ch. VI, § 2(1), (3) (Plaintiffs' Exh. 1). It is the City Manager who exercises control over City personnel through various officers and department heads. *Id.*[2]

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[1] These prohibitions are found in City Charter Ch. XVI, § 16 (b) and (c) (Plaintiffs' Exh. 1), and are included in Dallas personnel rules and departmental codes of conduct (Plaintiffs' Exhibit 2). Not challenged here is that provision which prohibits a city employee from wearing city council campaign buttons or distributing campaign literature "at work or in a city uniform or in the offices or buildings of the City of Dallas," Ch. XVI, § 16(b)(4); that provision which prohibits using "the prestige of [one's] position with the city for any partisan candidate," Ch. XVI, § 16(c)(1); and that provision which prohibits active support of a non-council candidate except on one's own time "while not in a city uniform nor in an office or building of the City of Dallas, Ch. XVI, § 16(c)(4) (R.I., 21-22).

[2] The Manager is an appointive rather than an elective position, and his appointment must be by vote of a majority of the 11 members of the City Council. *Id.*, Ch. VI, § 1.

> Neither the council nor any of its committees or members shall dictate or attempt to dictate the appointment of any person to, or his removal from, office or employment by the City Manager or any of his subordinates, or in any manner interfere in the appointment of officers and employees in the departments of administrative service vested in the manager by this charter. Except for the purpose of inquiry, the council and its members shall deal with that part of the administrative service for which the city manager is responsible solely through such manager, and neither the council nor any member thereof shall give orders to any of the subordinates of the city manager in said departments, either publicly or privately . . .

Dallas Charter, Ch. III, § 15. The willful violation of the foregoing provision by a council member constitutes "official misconduct," which authorizes the

Challenged in this proceeding are the City's absolute prohibitions, upheld by the panel below, on the following activities by individual employees:

(a) Contributing to nonpartisan city council candidates;

(b) Publicly endorsing nonpartisan council candidates in circumstances other than those sanctioned by the trial court;

(c) Circulating nominating petitions for nonpartisan city council candidates;

(d) Soliciting or receiving funds for nonpartisan council candidates or for partisan candidates; and

(e) Managing a partisan political campaign.

At issue with respect to the Committee is whether, as held by the panel, it may be absolutely prohibited from:

(a) Issuing endorsements of nonpartisan city council candidates to persons other than its own membership;

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expulsion of the council member by a two-thirds vote of the council. *Id.* § 16. The Chiefs of Police and Fire are subject to the control of the City Manager, rather than the City Council, in matters affecting personnel. *Id.* Ch. XII, § 2(1); Ch. XIII, § 2(1). While the chiefs of these departments may suspend or otherwise discipline their employees, appeal lies to the City Manager, not to the City Council. *Id.* Ch. XII, § 4; Ch. XIII, § 9. Subsequent to any disciplinary appeal to the City Manager, the employee has the right to avail himself of the Civil Service Trial Board. *Id.* Ch. XVI, § 12. The Charter expressly provides that appointment and promotion of employees are to be made "soley on the basis of merit and fitness," *Id.* Ch. XVI, § 13, and promotion, appointment or disciplinary action on the basis of political opinions or affiliations is prohibited. *Id.* § 16. Too, it is prohibited for any council member to attempt to require employees to contribute to any political campaign. *Id.*

(b) Contributing as an organization to nonpartisan city council candidates; and

(c) Soliciting or receiving funds for nonpartisan council candidates or for partisan candidates.

It is established that the individual petitioner and the Committee desire to engage in the activities set forth above, and, with further regard to contributions, that Wachsman desires to contribute to council candidates *"without any fanfare, as a private citizen, and without publicity"* (R.III, 11-12) (emphasis added). The Committee also desires to make these types of contributions (R.III, 14).

Of particular importance, it is stipulated that city council elections and offices are nonpartisan, and that the campaigns contain no substantial party involvement (R.I, 76-77). With respect to the partisan conduct in which petitioners desire to engage, the City has admitted before the court below that despite the absolute prohibition thereon, such prohibition is of "little significance to the City." Brief for Appellees, at 10 n.l.

REASONS FOR GRANTING THE WRIT

I.

The panel has held that the nonpartisan nature of Dallas City Council elections neither forecloses nor affects the municipality's right to impose complete prohibitions against employee or associational political activity of the type involved herein: contributing, publicly endorsing, petitioning, or soliciting or receiving campaign funds. Petitioners urge that nonpartisan political activity of the nature at issue here is not subject to absolute prohibition.

The Fifth Circuit has erred in failing to recognize the basic distinction, noted in *Morial v. Judiciary Comm'n*, 565 F.2d 295 (5th Cir. 1977) (*en banc*), *cert. denied*, 435 U.S. 1013 (1978), that nonpartisan *political* involvement differs from *party* involvement. As the court there warned:

> We do not mean to say that legislatures are necessarily equally free to restrict formally partisan and formally nonpartisan conduct. In any given case, the relevant inquiry must be whether the threat to the state's interests . . . stems from *party* involvement or from political involvement.

Id. at 304 n.8. This distinction is recognized because "[p]olitical oppression of public employees will be rare in an entirely nonpartisan system," *Magill v. Lynch*, 560 F.2d 22 (1st Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978), and "[t]he fact that

the race and the position are nonpartisan clearly reduces the potential for interference with the compelling objectives of Dallas . . . ." *Hickman v. City of Dallas,* 475 F. Supp. 137 (N.D. Tex. 1979), *aff'd mem.,* 634 F.2d 629 (5th Cir. 1980).

This critical difference between partisan and nonpartisan conduct, disregarded by the panel, has been legislatively recognized by the Hatch Act, 5 U.S.C. § 7326, and by this Court in *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers,* 413 U.S. 548 (1973). *See also Broadrick v. Oklahoma,* 413 U.S. 601 (1973). As noted in *Magill, supra,* a review of these Supreme Court cases shows that this Court "painstakingly and almost without exception confined its strictures to 'partisan' elections." 560 F.2d at 27.

> In short, the government may constitutionally restrict the employees' participation in *nominally* nonpartisan elections *if political parties play a large role* in the campaigns. In the absence of *substantial party involvement,* on the other hand, the interests identified by the *Letter Carriers* Court [i.e., government efficiency, danger of powerful political machines, employee freedom from supervisory coercion] lose much of their force.

Id. (footnote omitted; emphasis added); *accord, Gray v. City of Toledo,* 323 F. Supp. 1281, 1285, 1287 (N.D. Ohio 1971). The panel opinion puts the view of the Fifth Circuit in direct conflict with that of the First Circuit and this Court on this issue of paramount importance.

Should this Court view its "painstaking use" of the delimiting word "partisan" in *Letter Carriers* as being no indication that the Court would have held "otherwise had the restrictions [there in issue] not been limited to partisan activities," Appendix A, at 9, it should clearly state that to be its view. Put another way, should this Court believe *Letter Carriers* holds the same meaning if the word "partisan" is omitted from the opinion, and that the word is recurring surplusage and a mere consequence of the factual setting, as the panel suggests, Appendix A, at 6-20, this Court should make its view clear to those thousands of employees whose municipal employers may now absolutely ban most of their speech, all of their contributions and many of their other important activities as a result of the lower court's holding.

Speculative results and hypothetical situations aid little in creating reasons to justify curtailment of expression and association. *See, e.g.*, Appendix A, at 14-18. The issue is not whether it is a "good idea" or "reasonable" to limit these activities; given a Constitution that expressly guarantees speech and associational freedoms, and a recognition that its enforcement will create a less-than-Utopian result, the issue is: What burdens may an employer legitimately impose upon those freedoms, and in what manner may it impose them?

Petitioners urge that the approach utilized below is not a proper method by which to judge the legitimacy of these restrictions. The entire approach suggests that the panel — rather than re-

quiring the City to demonstrate compelling need — began its analysis by accepting as established an overriding interest of the employer, which it then challenged petitioners to disprove.

The panel declined to recognize what it characterizes as "an across-the-board distinction based purely on whether the elections are partisan or nonpartisan." Appendix A, at 18-19. This mischaracterizes the case and leads to an artificial mode of analysis. While petitioners have noted that this case involves a facial attack on the Charter provisions, the evidence and the argument make clear that this case involves principally an attack on the Charter provisions "as applied" to the factual setting before the Court. Petitioners do not ask the Court to recognize an across-the-board distinction between the character of partisan and nonpartisan activities, without more. They request the Court to recognize such a distinction based upon the facts of this case — where it is stipulated and factually apparent that the elections in issue are nonpartisan and contain no substantial party involvement.[3]

If the panel is correct that no such distinction is warranted, one must ask: Why does not the Hatch Act[4] prohibit *political activity on the national*

[3] Not presented here is a case in which the City's formal legal structure *alone* characterizes the elections as nonpartisan, as the panel suggests recurringly. Appendix A, at 15-18. Mere legal characterization cannot change the actual operation of the system. Presented here, however, is a situation where the legal characterization is nonpartisan *and*, as a factual matter, the elections contain "no substantial party involvement."

[4] The Hatch Act is generally viewed as establishing the outermost limit for restrictions on political activity of government workers. *See, e.g., Gray v. City of Toledo*, 323 F. Supp. 1281, 1286 (N.D. Ohio 1971).

level, rather than *partisan activity on the national, state and local levels*? What is it that makes it acceptable to work for and speak on behalf of John Anderson in 1980, but not Jimmy Carter or Ronald Reagan? Even more specific, what is it that permits a federal employee to become an "independent" candidate for the presidency, but not the Democratic or Republican nominee? If the partisan nominating process and the partisan machinery associated with that process do not provide the difference, then what does?

Failure to grant the writ will indicate for the first time this Court's willingness to subject public employees to greater restrictions on their rights of political expression and association than those approved in *Letter Carriers.* Denial of the writ in a case of this importance will provide an unequivocal indication to local, state and federal employers that "political activity," not merely "partisan politics," may be permissibly curtailed, and that the remedy of "more speech, not enforced silence," *Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), is no longer the remedy of preference.

Petitioners pray that the writ be granted.

II.

Petitioners maintain that the panel opinion parts company with precedent even in the absence of a recognized distinction between partisan and nonpartisan activity.

This is particularly true with respect to contributing and endorsing, rights which have until now been characterized as core or fundamental first amendment freedoms. *See, e.g., First Nat'l Bank v. Bellotti,* 435 U.S. 765 (1978); *Buckley v. Valeo,* 424 U.S. 1 (1976). As such, any restrictions imposed are subject to strict or exacting judicial scrutiny because they encroach directly on expression and association. *Citizens Against Rent Control v. Berkeley,* 454 U.S. 290 (1981). If any impairment is permissible, it must be by the least obtrusive means available. *See, e.g., Board of Educ. v. Pico,* U.S. , 102 S. Ct. 2799, 50 U.S.L.W. 4831, 4837 n.26 (1982); *NAACP v. Button,* 371 U.S. 415, 438 (1963). "[A]n absolute prohibition on a particular type of expression will be upheld only if *narowly* drawn to accomplish a compelling governmental interest." *United States v. Grace,* U.S. , 103 S. Ct. 1702, 51 U.S.L.W. 4444, 4446 (1983) (emphasis added), *citing Perry Educ. Ass'n v. Perry Local Educator's Ass'n,* U.S. , 103 S. Ct. 948, 51 U.S.L.W. 4165 (1983). Such a view is mandated by the first amendment because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964).

Other activities, such as running for office, soliciting campaign funds or circulating nominating petitions, are generally viewed as important and substantial, yet less than "fundamental." *See, e.g., Clements v. Fashing,* U.S. , 102 S. Ct. 2836, 50 U.S.L.W. 4869, 4871 (1982); *Morial v.*

Judiciary Comm'n, supra. Nevertheless, even when the impairment is incidental or less direct, regulation is justified only in narrow instances. *NAACP v. Claiborne Hardware Co.,* ..... U.S. ....., 102 S. Ct. 3409, 50 U.S.L.W. 5122, 5129 (1982), *citing United States v. O'Brien,* 391 U.S. 367 (1968).

A reading of its opinion reveals the panel failed to require the City to demonstrate anything more when regulating fundamental guarantees than when regulating non-fundamental rights.[5] A review of the authorities, however, suggests that if restrictions on endorsements by individuals or associations are permissible at all, it is only in cases where the endorsements are communicated in some form of political advertising or to a political rally or similar gathering. *See United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, supra.* Petitioners maintain that in the circumstances here, the restriction on endorsements is not permissible in any case, despite the interests asserted by the City.[6]

The same is true regarding the City's absolute restriction against political contributions. *Buck-*

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[5] The panel opinion goes so far as to suggest that an absolute ban on contributions in referenda elections may also be permissible, Appendix A, at 21 n.17, despite this Court's holdings to the contrary. *Citizens Against Rent Control v. Berkeley,* 454 U.S. 290 (1981); *Buckley v. Valeo,* 424 U.S. 1 (1976).

[6] The panel discounts apparently the notion that the nonpartisan nature of most of the activities in question "clearly reduces the potential for interference with the compelling objectives of Dallas. . . ." *Hickman v. City of Dallas,* 475 F. Supp. 137 (N.D. Tex. 1979), *aff'd mem.,* 634 F.2d 679 (5th Cir.1980). While one might urge that the nonpartisan nature of the activities is not dispositive of the issue presented here, it does not automatically follow that the nonpartisan framework is not a factor to be considered in assessing the constitutionality of the Charter restrictions.

ley v. Valeo, supra, indicates that the right to contribute is fundamental, yet the panel suggests that a general reasonableness standard is appropriate in deciding the constitutional legitimacy of the restriction.[7] Appendix A, at 26-32. The panel's own citation of *Buckley* is of little help, inasmuch as although this Court held that contribution *limitations* could be imposed, it made clear that *absolute prohibitions* are impermissible. *See also First Nat'l Bank v. Bellotti, supra.* This, too, is the clear import of this Court's language in *Clements v. Fashing, supra,* U.S. at , 50 U.S.L.W. at 4873, and *Citizens Against Rent Control v. Berkeley,* 454 U.S. 290 (1981).

Even the Hatch Act fails to go so far as to prohibit contributions to *partisan* candidates. Yet, not only does the panel approve generally of inflexible contribution restrictions, it approves of those restrictions when they prohibit an employee, like Wachman, from making a contribution "without any fanfare, as a private citizen, and without publicity" (R.III, 11-12); Appendix A, at 31. In doing so the panel places itself at odds with substantial precedent of this Court.

Petitioners candidly admit that legitimate, nonspeculative governmental interests may in some

[7] *Citing Morial, supra,* Appendix A, at 26, the panel characterizes the right to contribute as "substantial" rather than "fundamental." The quoted portion of *Morial* deals with the right to candidacy, a "substantial" first amendment right, not with the right to contribute. Apparently, the panel makes the same mistake regarding the "pure speech" issue of endorsements. The panel draws no clear distinction between restrictions implicating speech and association directly and those whose first amendment implications are indirect (e.g., circulating petitions soliciitng funds).

situations justify limited encroachment upon first amendment terrain, when that encroachment does no more than implicate rights of expression and association indirectly. *See Clements v. Fashing, supra.* This is true with regard to petitioners' desire to circulate nominating petitions and to solicit campaign contributions from others.

Petitioners know of no persuasive precedent, however, that sanctions broad, absolute and direct encroachments upon expression and association, such as established by the Dallas Charter, with its absolute bans on contributing and endorsing.

III.

Even less compelling is the City's interest in restricting those partisan activities at issue here and upheld below, namely, managing a partisan campaign and soliciting or receiving contributions for partisan candidates. Clearly, these activities relate to non-City elections in which it cannot be urged that the City has a direct interest. The panel has upheld these restrictions even though *the City admits that "[a] prohibition of partisan activity would be of little significance to the City . . ."* Appellees' Brief at 10 n.1 (emphasis added). It is fundamental that if restrictions of first amendment activities are permissible at all, they must be aimed at achieving important governmental objectives, and then any restrictions must be accomplished by the least constitutionally obtrusive means available. *See e.g., Blount v. Rizzi,* 400 U.S. 410, 417, (1971); *Keyeshian v. Board of Regents,* 385

U.S. 589, 603-604 (1966). *See also Anderson v. Celebrezze,* U.S. , 103 S. Ct. 1564, 51 U.S.L.W. 4375 (1983).

Moreover, if the panel's analysis of *Letter Carriers* is correct — and petitioners insist it is not — it would seem that because the City operates in a nonpartisan arena it may only prohibit nonpartisan activity. In any event, a restriction of substantial first amendment rights cannot be justified in situations where the restriction is admittedly "of little significance" to City interests.

IV.

Insofar as the panel opinion may be read to suggest that the activities of the petitioner association are entitled to less first amendment protection than those of individuals, *e.g.,* Appendix A at 3 n.3, 15, the opinion is at odds with *Buckley v. Valeo, supra,* 424 U.S. at 15, and *NAACP v. Alabama,* 357 U.S. 449, 460 (1958). As noted in *First Nat'l Bank v. Bellotti, supra,* "[t]he inherent worth of the speech . . . does not depend upon the identity of its source, whether corporation, association, union, or individual." 435 U.S. at 777. *Accord, NAACP v. Claiborne Hardware Co.,* U.S. , 102 S. Ct. 3409, 50 U.S.L.W. 5122 (1982); In *Citizens Against Rent Control v. Berkeley,* 454 U.S. 290 (1981), this Court, through Mr. Chief Justice Burger, only recently addressed such a suggestion: "There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them."

CONCLUSION

The panel's opinion signals a clear departure from precedent. It mischaracterizes the holding of this Court in *Letter Carriers,* and it establishes a conflict between the views of the Fifth and First Circuits with regard to nonpartisan and partisan activity.

The panel opinion additionally departs from the mandates of *Buckley, Bellotti, Citizens Against Rent Control, Grace,* and others in approving absolute restrictions that directly implicate freedom of expression and association.

One of the "pernicious possibilities" (Appendix A, at 26) that truly results from this case if the writ is not granted is that the lower courts may now reject the proposition that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity v. New Jersey,* 385 U.S. 493, 500 (1967). Only in limited circumstances may the employees of Dallas whisper; the panel has insured that they will not speak.

For the reasons set forth above, a writ of certiorari should issue to review the opinion of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was forwarded to attorney for respondents Joseph G. Werner, on the 22 day of September, 1983.

Kenneth H. Molberg

APPENDIX A

RICHARD WACHSMAN, ET AL.,
PLAINTIFFS-APPELLANTS,

v.

CITY OF DALLAS, ET AL.,
DEFENDANTS-APPELLEES

No. 81-1471

United States Court of Appeals,
Fifth Circuit.

May 2, 1983.

Appeal from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, GEE and GARWOOD, Circuit Judges.

GARWOOD, Circuit Judge.

To what extent may a city regulate the political activities of its employees when city elections are conducted on a "nonpartisan" basis? Broadly stated, this is the principal issue we face in the present case.

Dallas fireman Richard Wachsman and the Dallas Police & Fire Action Committee ("Committee") requested injunctive relief against the City of Dallas ("City") and the chiefs of the police and fire departments.[1] At issue were sections 16(b) and 16(c) of Chapter XVI of the City Charter of the City of Dallas, Texas, which provide:

> "(b) To avoid undue influence of city employees on the outcome of city council elections and to avoid undue influence of city councilmen or candidates for city council on city employees, the following restrictions are imposed:
>
> "(1) No employee of the city or association of such employees may publicly endorse or

[1] The Committee, the joint political arm of the Dallas Police Association and the Dallas Professional Firefighters' Association, represents more than 3,000 City of Dallas fire and police employees. The Committee was formed in 1978 to campaign for a pay increase referendum, which was approved by Dallas voters in 1979.

[2] Although neither party has questioned our jurisdiction, we note that a live case or controversy is present. Wachsman stated that he wished to engage in the various specific activities actually at issue below and before us that are prohibited by the City Charter, and that he had not done so because he feared disciplinary action. Dan Bell, chairman of the Committee, testified that the Committee desired to do likewise and also feared discipline. Given that this testimony was uncontradicted and that we are confronted with a statute imposing restraints on first amendment rights, a case or controversy exists. *See United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973).

actively support candidates for the city council or any political organization or association organized to support candidates for the city council;

"(2) No employee of the city may circulate petitions for city council candidates, although he may sign such a petition;

"(3) No employee of the city may contribute, directly or indirectly or through an organization or association to such a campaign nor solicit or receive contributions for a city council candidate;

"(4) No employee of the city may wear city council campaign buttons nor distribute campaign literature at work or in a city uniform or in the offices or buildings of the City of Dallas.

"(c) In elections other than for city council of the City of Dallas, an employee of the city may not:

"(1) Use the prestige of his position with the city for any partisan candidate;

"(2) Manage a partisan poltical campaign;

"(3) Solicit or receive contributions for such a campaign;

"(4) Actively support a candidate except on his own time while not in a city uniform nor in an office or building of the City of Dallas."

Appellants Wachsman and the Committee did not challenge subsections (b)(4), (c)(1), and (c)(4).

The district court held section 16(b)(1) unconstitutional insofar as it prohibited "an employee

of the Dallas Police Department or Dallas Fire Department from endorsing a city council candidate before any group of more than 15 people, unless such group is a convention, caucus, rally or similar gathering."[3] The City has not appealed from this holding. The district court upheld the constitutionality of the remainder of the sections as challenged by the plaintiffs. On appeal Wachs-

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[3] The district court found that the City had authoritatively interpreted section 16(b)(1) as not prohibiting a city employee from endorsing a city council candidate to any group of fifteen (15) or fewer people. This finding is not challenged, and the parties treat the issues before us as if this "exception" were written into section 16(b)(1). We accordingly do likewise.

Similarly, the district court noted that:

"In addition, by way of an amended answer filed in this cause on March 12, 1981, the contested issues in this action were narrowed considerably. The defendants now admit that the following activities are permitted by sections 16(b) and 16 (c):

"(A) city employees may place city council campaign signs in their yards and on the premises of their homes,

"(B) city employees may place [city council campaign] bumper stickers on the vehicles which they own,

"(C) the spouses of city employees may contribute to the campaign of a city council candidate and may solicit and receive contributions for a city council candidate,

"(D) the spouses of city employees, and associations and organizations of spouses of city employees, may publicly endorse and actively support city council candidates,

"(E) the spouses of city employees, and associations and organizations of city employees, may circulate petitions for city council candidates,

"(F) city employees may work in campaign headquarters of city council candidates, and

"(G) an association or organization of city employees may mail or otherwise distribute endorsements of city council candidates to the city employee members of such organization or association."

Also, in its amended answer below the City admitted that the City Charter did not prohibit city employees from wearing city council campaign buttons, or distributing campaign literature, except while at work, or in a city uniform, or in the offices or buildings of the City of Dallas.

Again, the parties treat all the foregoing matters as if embraced in express exceptions to the relevant sections of the City Charter; we do likewise.

Finally, the district court also found:

"12. The restrictions contained in Sections 16(b) and 16(c) are not aimed at particular groups or points of view, but apply equally to all partisan and nonpartisan activities of the types described. They discriminate against no racial, ethnic, or religious minorities. Nor do they seek to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls.

"13. The City Charter does not prohibit Wachsman and the Committee's other members from privately or publicly expressing their views on political subjects, from campaigning in connection with referenda,[2] from privately endorsing or expressing their support for city council candidates, from signing petitions in support of city council candidates, or from voting in both city council and partisan elections [all city elections are nonpartisan]. Moreover, the City Charter does not prohibit the Committee, the Committee's members, or Wachsman from contributing to partisan candidates, or from publicly endorsing or actively supporting partisan candidates while not on duty, in uniform, or in a City office or building.

"[2] Both individual policemen and the Committee campaigned actively and successfully in support of a recent referendum concerning a 15 percent pay increase for police and firefighters.

"14. The City will provide Wachsman and the Committee with a limited form of preconduct review."

None of the foregoing is disputed on appeal. No challenge is made to the adequacy of the "preconduct" review. Nor is any part of the City Charter challenged on grounds of vagueness.

We also observe that the Committee does not claim to have any greater constitutional rights to be free of the regulations in question than those rights which it asserts are possessed by and applicable to its city employee members.

man and the Committee present the following issues:

1. Whether the City can prohibit financial contributions by these city employees or their organizations to city council candidates.

2. Whether the City can prohibit public endorsements of city council candidates by these city employees or their organization, even as narrowed by the district court's order.

3. Whether the City can prohibit these city employees from circulating (though not from signing) endorsement petitions for city council candidates.

4. Whether the City can restrict these city employees or their organization from soliciting and/or receiving campaign funds on behalf of city council candidates, *or* for partisan political campaigns.

5. Whether the City can prohibit these city employees from managing partisan political campaigns.

Entwined in these issues are two novel questions for this Circuit. In the "Hatch Act" cases, *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973), and *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), the Supreme Court approved certain restrictions on the political activities of federal and state employees in a partisan

setting. The Hatch Act,[4] however, does not impose a ban upon campaign contributions. Therefore, we must decide whether the City can impose restrictions in a nonpartisan setting similar to those approved in *Letter Carriers* and *Broadrick*, and, if so, whether the rationale of these cases also allows the City to prohibit city employee contributions to city council candidates.

PARTISAN/NONPARTISAN

The parties stipulated that Dallas municipal elections and offices are "nonpartisan," and that "there is no substantial party involvement in the city council elections."[5] Relying on this fact and the emphasis in *Letter Carriers* and *Broadrick* on partisan political activity by government employees, 413 U.S. at 557-67, 93 S.Ct. at 2886-2887 and 413 U.S. at 606, 93 S.Ct. at 2912-2913, Wachsman and the Committee argue that the Hatch Act cases do not control this case. Appellants also heavily rely on *Morial v. Judiciary Commission*, 565 F.2d 295

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[4] The Hatch Act is codified in Title 5 and 18 of the United States Code. The provision, considered in *Letter Carriers* was 5 U.S.C.A. § 7324, which provides in part:

"(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not—

"(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or

"(2) take an active part in political management or in political campaigns.

"For the purpose of this subsection, the phrase 'an active part in political management or in political campaigns' means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

"(b) An employee or individual to whom subsection (a) of this section applies retains the right to vote as he chooses and to express his opinion on political subjects and candidates."

[5] The Dallas city elections are held in odd-numbered years, there are no party primaries or party nominating structures, and the party affiliation of candidates is not reflected on the ballot. While the political parties may not have substantially involved themselves in the campaigns, known party affiliation of candidates was apparently something of a factor in the elections. An expert witness for the City testified that "[I]t's conceivable that the partisanship that flared up in the last city election may become a part of city elections." Also, when asked, "Is there any partisan activity in the city elections," the expert replied, "No, officially but, yes, there is." She explained that this activity occurred "in the sense that the partisan affiliation of candidates, when it is made visible, becomes a campaign issue."

(5th Cir.1977) (*en banc*), *cert. denied,* 435 U.S. 1013, 98 S.Ct. 1887, 56 L.Ed.2d 395 (1978), and *Magill v. Lynch,* 560 F.2d 22 (1st Cir.1977), *cert. denied,* 434 U.S. 1063, 98 S.Ct. 1236, 55 L.Ed.2d 763 (1978). In the latter case, without citation or explanation, the Court stated: "Political oppression of public employees will be rare in an entirely nonpartisan system." 560 F.2d at 29. *Magill* concerned firemen's political participation in Pawtucket, Rhode Island city elections which were "nominally" nonpartisan. The Court held that "the government may constitutionally restrict its employees' participation in nominally nonpartisan elections if political parties play a large role in the campaigns." *Id.* (footnote omitted). In Pawtucket parties did play such a role.* The Court made no firm pronouncement on whether the employees' first amendment rights would outweigh the city's interests in controlling their political activities in elections in which party involvement was absent, but it did state that in such a situation "the [governmental] interests identified by the *Letter Carriers* Court [would] lose much of their force." *Id.*

In *Morial,* which concerned Louisiana's statutory requirement that judges resign before running for elective nonjudicial office, the Court also found significant party involvement in a "nonpartisan"

* In *Magill* the Court noted that the city elections were held in odd years and did not utilize party nominating machinery or refer to party affiliation on the ballot. It observed that "so far as the laws of Pawtucket can make them, these elections are nonpartisan." 560 F.2d at 26. It further stated that "[t]he [trial] court's characterization of Pawtucket's municipal elections as 'substantially non-partisan' also seems to be a fair and supported summary description." *Id.* at 27. However, the opinion also observed that party endorsements were actively, if not formally, sought and were usually decisive in the elections. *Id.* at 26.

election.[7] The Court stated, "In any given case, the relevant inquiry must be whether the threat to the state's interests in the impartiality of its public servants stems from *party* involvement or from political involvement." 565 F.2d at 303-04 n. 8. The opinion also observes that "[i]n the context of the Hatch Act which regulates the activities of federal employees, it was natural for the Supreme Court [in *Letter Carriers*] to discuss the dangers of partisanship as if they were substantially identical to the dangers of *party* domination," and that "[a] faction may form around a man as much as around a party label; the judicial office may be abused by using it to promote the interest of a faction as well as a formal party." *Id.* Wachsman and the Committee insist that simple political involvement does not raise concerns of sufficient significance to warrant infringement of employees' rights, and that the problems raised by party involvement are what makes such infringement constitutionally permissible. This, according to appellants, is why *Morial* states that courts must distinguish between party and political involvement. The City counters by arguing that *Morial* means courts should not rely on labels in deciding these cases.

While each side in the case at bar can derive a measure of comfort from various expressions in the *Morial* and *Magill* opinions, we regard neither

[7] The Court observed that although the New Orleans city elections were legally nonpartisan and Morial would not "run as a party representative," in fact "formal party and political organizations with defined constituencies play a major role in New Orleans mayoralty campaigns." 565 F.2d at 304 n. 8.

holding as decisive in the present context. Neither decision invalidated the restrictions there in issue. However, though the New Orleans and Pawtucket municipal elections were legally structured as "nonpartisan," political parties nevertheless played a more significant and overt role in the actual results in these cities than is the case in Dallas. Neither decision purports to definitively address the issue we face here.[8]

We are unwilling to strike down Dallas Charter provisions merely because of the noted nonpartisan nature of the Dallas city council elections.

Not only did *Letter Carriers* uphold the Hatch Act, but the Supreme Court's opinion contains no direct statement that the result would have been otherwise had the restrictions not been limited to partisan activities. Admittedly, the opinion stresses the partisan factor, but, consistent with *Morial,* we believe that this is because political activity at the federal level is partisan, in both an inter-party and an intra-party sense.[9] This is not simply a coincidence, but is rather a factor establishing the requisite closeness of the relationship between the restrictions in question and the legitimate governmental ends to be served thereby. One aspect of this was accurately capsulized by the statement of the City's expert witness at trial that "[w]hat the Hatch Act tries to do is keep the employee from being involved in the politics that

[8] Indeed, *Morial's* comments on "partisanship" are confined to a footnote.

[9] In *Broadrick* the Oklahoma "little Hatch Act" provisions were directed only to state employees, and there is no suggestion that Oklahoma state politics were not in fact partisan.

elects his boss." Accordingly, even if Hatch Act type restrictions imposed on its employees by the federal government, where the relevant politics is essentially partisan, would be constitutionally invalid if generally extended to nonpartisan political activity, it would not necessarily follow that municipalities whose relevant politics are essentially nonpartisan would not be able to constitutionally impose restrictions applicable to their nonpartisan elections on municipal employees.

While *Letter Carriers* indisputably contains frequent references to partisan politics and political parties, it also contains several crucial passages, identifying the harms to important societal interests attendant on the politicalization of governmental service. The discussion in these passages is in terms of politics generally rather than simply party or partisan politics. Quoting with apparent approval from *United Public Workers v. Mitchell,* 330 U.S. 75, 98, 67 S.Ct. 556, 569, 91 L.Ed. 754 (1947), Justice White, in *Letter Carriers,* 413 U.S. at 555, 93 S.Ct. at 2885, observed that in *Mitchell* the Court stated that in enacting the Hatch Act, Congress had "recognized the 'danger to the [government] service in that political rather than official effort may earn advancement and to the public in that governmental favor may be channeled through political connections'." Justice White's opinion in *Letter Carriers* continues by stating that a decision to uphold the Hatch Act.

> ". . . would no more than confirm the judgment of history, a judgment made by this

country over the last century that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited" *Id.* at 557, 93 S.Ct. at 2886.[18]

These governmental interests subserved by restrictions on the political activities of federal employees are restated and elaborated on in these subsequent passages from *Letter Carriers*:

"There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent. [*Id.* at 565, 93 S.Ct. at 2890.]

". . . .

"A related concern, and this remains as important as any other, was to further serve the goal that employment and advancement in the Government service not depend on political performance, and at the same time to

[18] *Letter Carriers* also notices, as an early antecedent of more recent restrictions on the political activities of federal employees, the order issued, at the direction of President Jefferson, by the heads of the federal executive departments, providing:

" '[t]he right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it.' " 413 U.S. at 557, 93 S.Ct. at 2886.

In the same vein, Justice White references President Cleveland's Executive Order warning federal employees " 'against the use of their official positions in attempts to control political movements in their localities.' " *Id.* at 558 n. 6, 93 S.Ct. at 2887 n. 6.

> make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs." [*Id.* at 566, 93 S.Ct. at 2890-2891.]

And, Letter Carriers identifies still another "major concern" as being "the conviction that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine." *Id.* at 565, 93 S.Ct. at 2890.

All these concerns led the Court in Letter *Carriers* to conclude that "plainly indentifiable acts of political management and political campaigning on the part of federal employees may constitutionally be prohibited." *Id.* at 567, 93 S.Ct. at 2891.

We read *Letter Carriers* as recognizing several important societal interests which would be sufficiently adversely affected by certain conditions potentially attendant on unrestrained political activity of governmental employees as to justify substantial restrictions on those activities. At least four such societal interests may be identified: the interest in an efficient government; that in a government which enjoys public confidence; that in the right of individual citizens to be free of governmental discrimination based on their political activities or connections; and that in the right of governmental employees to be free of employer pressure in their personal political decisions. The

potential conditions which would be harmful or injurious to these important societal interests include the following three. First, the condition could exist in which "employment and advancement in Government service" is made to "depend on political performance" rather than on "official effort" or "meritorious performance." This not only impairs the efficiency of government directly, by depriving it of the services of the more capable for the positions so affected, but also indirectly, by its adverse effects on employee morale. This condition is also injurious to the governmental employees' rights to be free of employer pressure to affiliate with a candidate they may personally abhor or "to perform political chores in order to curry favor with their superiors rather than to act out their own beliefs." Moreover, this condition obviously tends to undermine public confidence in government. A second harmful condition is that of governmental employees "practicing political justice," or exercising "political influence . . . on others," or channeling "governmental favor" "through political connections." Such a condition is seriously injurious to the rights of individual citizens to be free of governmental discrimination based on their political activities or connections. It also impairs public confidence in government. Governmental efficiency is also adversely affected in that governmental administration is deflected from the direct and purposeful implementation of the laws and policy choices made by those charged with that responsibility, generally the elected representatives, and is instead focused on furtherance of the political ob-

jectives of the civil servant. Third, the condition may occur under which "the political influence of federal employees" is brought to bear without restraint "on the electoral process," or the governmental work force is employed to build a powerful "political machine." This condition undermines public confidence in government both because it tends to cast government in the light of master rather than servant of the people, and because it involves use of governmental power for purposes other than those for which the government was instituted. The latter factor also impairs governmental efficiency in the exercise of its proper purposes.

We believe that the foregoing conditions are no less harmful merely because they may be brought about by political pressures generated in a nonpartisan, rather than a partisan, political context. If Police Officer Smith is best suited for a promotion vacancy, but the promotion goes instead to Officer Jones, who is not qualified for the position, because Jones helped in the Mayor's reelection campaign by soliciting campaign contributions from the businesses and residents on his beat while Smith, whose personal preference was the Mayor's opponent, refused to do so, does it make any difference whether the campaign was partisan or nonpartisan? Will not the injuries to the efficiency of the police force and its morale, and to the rights of Officer Smith, be fully as grievous in the one case as in the other? Will not the confidence of the public be just as undermined? Have not the citizens on

Officer Jones' beat been just as imposed on by being solicited by the very governmental employee to whom, day in and day out, they must look for both effective police protection and for evenhanded, reasonable enforcement of the laws regulating their own conduct?

Nor are we able to say with any confidence, on the basis of history or common knowledge, that if mayoralty campaigns were nonpartisan rather than partisan, the result would be a reduction in the likelihood of occurrences, of the kind above hypothesized, of such magnitude and reasonable consistency among different localities as to mandate one federal constitutional requirement for the cities with "partisan" elections and another for all those whose elections were "nonpartisan."[11]

An across-the-board constitutional distinction for these purposes between "partisan" and "nonpartisan" elections to local legislative and executive type offices seems questionable on other grounds as well. We doubt that such human traits as personal ambition, greed, fear, and the like, on the one hand, and commitment to principle, unselfishness, honor, and similar characteristics, on the other hand, are distributed among such candidates and their supporters in significantly different proportions according to whether the election by

[11] The trial court found here:

"The City employees might reasonable fear retaliation for failing to support or contribute to a city council candiate if there is no prohibition on their not participating in these activities; incumbent city councilpersons could gain an unfair political advantage if city employees were not prohibited from participating in city council elections; and, political favoritism or the appearance of political favoritism could result from the city employees participating in city elections.

". . . The fear of political retaliation would materially interfere with the City's ability to recruit and maintain an efficient and impartial city work force."

which they are to be chosen is "partisan" or "nonpartisan." Experience in years past in most areas of the former Confederacy also cautions against making such a distinction. There, generally the only relevant elections at the state and local levels were the Democratic primaries, and the only relevant contending forces and organizations were those which coalesced around the various candidates and interest and ideological groupings, rather than around any formal party structure or machinery. Yet this state of affairs did not substantially eliminate the adverse effects of active governmental employee electioneering.[12] We would be reluctant to hold that in such situations, some of which persist even to this day, "little Hatch Acts" would be unconstitutional. Nor in that setting would it seem reasonable to uphold a "little Hatch Act" *merely* because of the formality of a general election legally structured as partisan, even though normally such an election, typically involving only one candidate, would have no true relevance whatever to the actual workings of the political process.

We are taught by *Magill*, and at least inferentially by *Morial*, that Hatch Act type restrictions imposed by a governmental entity on its employees are not invalid merely by reason of the fact "so far as the laws of . . . [that entity] can make them, . . . [its] elections are nonpartisan." *Magill*, 560 F.2d at 26. But, rejecting as we must the contention that a municipality's Hatch Act type re-

[12] *Broadrick* calls attention to the fact that all fifty states have statutes patterned on the Hatch act. 413 U.S. at 603-04, 93 S.Ct. at 2911-2912.

strictions are invalid merely because the formal legal structure of its elections is as nonpartisan as the law can make elections, should we nevertheless hold that the determinative consideration is whether the elections are *in fact* nonpartisan? Were we to do so, we would embark on a course with few meaningful guideposts for judicial decision. What is a political party for such purposes? Were the "New Party" and the "Old Party," which contended for political power in certain areas of South Texas, political parties? What of the "Good Government" and "Citizens Leagues" and similar organizations that have been significant forces for long periods of time in the legally "nonpartisan" political affairs of certain Texas municipalities? What of organizations such as the "West Austin Democrats," which frequently endorse candidates in the legally "nonpartisan" municipal elections of the capital city of Texas? Moreover, it is common knowledge that when other state and local elections within the geographical area of a municipality are legally and factually conducted on a partisan basis, partisanship will almost inevitably have at least *some* bearing on the municipal elections even though they are in legal form nonpartisan and are held in different years from the legally partisan elections. *See* note 5, *supra*. How much "partisan" activity or influence is necessary to cause an election, the legal structure of which is "nonpartisan," to nevertheless be sufficiently "partisan" *in fact* for purposes of the rule for which appellants contend? To what extent, if any, should this depend on how close the elections are, given that the closer the

election, the less partisan activity or influence is required to render partisanship potentially outcome-determinative? And, what kind of activity is "partisan" for these purposes? Is it necessary that the political parties act through their formal structures, or will action of informal party "clubs" suffice? What of endorsement advertisements by citizens, perhaps including local officials elected in legally partisan elections, identifying themselves by party affiliation and the supported city council candidate as a long-time member of that party? Moreover, a determination of whether elections are partisan in fact, apart from their legal structure, involves primarily the consideration of matters which by their nature will tend to vary over time. Some variations will come about abruptly, others incrementally. If in the last two municipal elections the campaigns have become progressively more partisan on each occasion, may the city adopt a "little Hatch Act" in anticipation that the trend will continue? Will we hold the city's "little Hatch Act" invalid as to one election but valid as to the next, or vice versa, though there has been nointervening change in the legal structure of the elections?[13]

We decline to adopt as the touchstone for decision in this area an across-the-board distinction

[13] Moreover, considerations similar to those which counsel against an across-the-board distinction between partisan and nonpartisan political activity when evaluating the societal interests to be protected by restrictions on certain political activities of governmental employees, likewise militate against employing that distinction in evaluating the interests of the employees desiring to perform such activities. Are the interests of a city employee who would like to circulate an endorsement petition for a candidate in the city's mayoralty election, but is prohibited from doing so by the city charter, any *less* infringed in the election is nonpartisan than if it is partisan? We think not. The politically so-inclined city employee gives up the *same* thing in either case: the ability to circulate an endorsement petition for a candidate in the city's mayoralty election.

based purely on whether the elections are partisan or nonpartisan. For purposes of judging the validity of restrictions on election-related activity in the light of first amendment considerations, we believe it more meaningful to distinguish between elections on the basis of whether they are candidate elections or noncandidate elections, such as referenda and constitutional amendment elections. *See Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298-99, 102 S.Ct. 434, 438-439, 70 L.Ed.2d 492, 501 (1981)[14]; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790, 98 S.Ct. 1407, 1423, 55 L.Ed.2d 707, 726 (1978) ("Referenda are held on issues, not candidates for public office."); *Let's Help Florida v. McCrary*, 621 F.2d 195, 199-200 (5th Cir. 1980), *aff'd mem. sub nom., Firestone v. Let's* Help Florida, 454 U.S. 1130, 102 S.Ct. 985, 71 L.Ed.2d 284 (1982). That distinction is preserved in the Dallas City Charter.

[1] Since we have identified governmental interests served by the restrictions on city employee activities in city council elections that are as significant as those found in *Letter Carriers*, and since, with the exception of contributions, the Su-

[14] In invalidating contribution limitations in city referenda or initiative elections, *Citizens Against Rent Control* states: "Whatever may be the state interest or degree of that interest in regulating and limiting contributions to or expenditures of a candidate or a candidate's committees there is no significant state or public interest in curtailing debate and discussion of a ballot measure." 454 U.S. at 299, 102 S.Ct. at 439.

preme Court upheld very similar restrictions in that case,[15] we see no reason to distinguish these provisions on a partisan/nonpartisan basis. They are constitutional.[16]

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[15] The general prohibition in section 7324(a), see note 4, *supra*, invoked certain Civil Service Commission rules prohibiting the following actions by governmental employees:

"(1) Serving as an officer of a political party, a member of a National, State, or local committee of a political party, an officer or member of a committee of a partisan political club, or being a candidate for any of these positions;

"(2) Organizing or reorganizing a political party organization or political club;

"(3) *Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose;*

"(4) Organizing, selling tickets to, promoting, or actively participating in a fund-raising activity of a partisan candidate, political party, or political club;

"(5) *Taking an active part in managing the political campaign of a partisan candidate for public office or political party office;*

"(6) Becoming a partisan candidate for, or campaigning for, an elective public office;

"(7) Soliciting votes in support of or in opposition to a partisan candidate for public office or political party office;

"(8) Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or partisan candidate;

"(9) Driving voters to the polls on behalf of a political party or partisan candidate;

"(10) *Endorsing or opposing a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literture, or similar material;*

"(11) Serving as a delegate, alternate, or proxy to a political party convention;

"(12) *Addressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office;* and

"(13) *Initiating or circulating a partisan nominating petition.*" 413 U.S. at 577-78 n. 21, 93 S.Ct. at 2896-2897 n. 21 (emphasis added) (quoting 5 C.F.R. § 733.122).

[16] Appellants further contend that the Charter restrictions in issue are unnecessary because other Charter provisions adequatly safeguard the City and its employees. They point to the provisions of Chapter III, section 15, that "[n]either the council nor any of its committees or members shall dictate or attempt to dictate the appointment of any person to, or his removal from, office or employment by the city manager or any of his subordinates . . . and neither the council nor any member thereof shall give orders to any of the subordinates of the city manager . . . either publicly or privately." The city manager is appointed and removable by the council. Appellants also rely on Chapter XVI, section 16(a), which provides:

"No person shall be appointed, reduced, removed, or in any way favored or discriminated against because of race, sex, political or religious opinions or affiliations. No officer or employee of the city shall directly, or indirectly, in any way be required to contribute to any political campaign, political party, organization which supports candidates for public office, or for any partisan political purpose whatsoever."

These Charter provisions do not distinguish this case from *Letter Carriers*. Certainly, many federal civil service employees are in form and in fact as isolated from adverse personnel decisions by elected or politically appointed officials as are employees of the City of Dallas. Moreover, there are likewise federal laws and regulations prohibiting political coercion of federal employees. *See, e.g.* 5 U.S.C. §§ 7321, 7322, 7323. These considerations however, did not serve to invalidate the Hatch Act restrictions on employee political activity. As Justice White stated in *Letter Carriers*:

"It may be urged that prohibitions against coercion are sufficient protection; but for many years the joint judgment of the Executive and Congress has been that to protect the rights of federal employees with respect to their jobs and their political acts and beliefs it is not enough merely to forbid one employee from attempting to influence or coerce another." 413 U.S. at 566, 93 S.Ct. at 2891 (footnote omitted).

Moreover, appellants' contentions in this respect overlook the interests of individual private citizens in not being subjected to political solicitation by city employees to whom they must look for the provision of essential governmental services and the evenhanded administration of regulations, each of which may to a significant extent involve the exercise of employee discretion in particular instances. These contentions of appellants likewise fail to respond to the concern respecting the governmental work force's being employed to build a powerful political machine.

OTHER ATTACKS ON THE CHARTER RESTRICTIONS

Appellants argue that whatever the City's interests may be, they could not apply to the restrictions on campaigns for offices other than city council, as the fear of employer overreaching would not be present. In other words, the City has no interest in preventing Wachsman from managing, or soliciting funds for, the partisan campaign of a candidate for a local, statewide, or national elective office, as long as the political activity does not interfere with Wachsman's work.[17]

Virtually all the numerous restrictions on federal employee political activity upheld in *Letter*

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[17] We do not address two perhaps questionable areas for the application of clauses (2) and (3) of section 16(c), dealing with elections other than those for city council.

First, it might be argued that these restrictions apply to noncandidate elections, such as elections on state constitutional amendments. However, read in context with sections 16(c)(1) and (4), and with the fact that the City does not restrict the activities of its employees in respect to city referenda (*see* trial court finding 13 quoted in note 3, *supra*), it would apear that clauses (2) and (3) of section 16(c) were intended to apply only to candidate elections. These clauses expressly apply only to partisan elections, and constitutional amendment elections are normally not considered partisan, *Letter Carriers; Broadrick*, are not legally structured as partisan in Texas. Moreover, candidate elections are evidently the entire subject matter of both section 16(b) and section 16(c). No contention was made below, or on appeal, by either party that these clauses extended to noncandidate elections, and the evident tacit assumption by both parties was that they applied only to candidate elections. We proceed on that assumption. However, we do ot suggest that a prohibition of referenda election campaign financial soliciting of city residents by city employees would necessarily be invalid, for there is a significant interest in private citizens not being subjected to such pressures from those on whom they depend for governmental services and for fair enforcement of laws and regulations. In any event, no such restriction respecting referenda elections is involved in this case.

Second, the question might arise of possible application of clauses (2) and (3) of section 16(c) to elections and related activity occurring entirely outside the City of Dallas. For example, does clause (3) prevent a Dallas police officer from soliciting funds in Fort Worth for a partisan election to be held within that city? This issue was not expressly raised below, or on appeal, and neither Wachsman nor anyone for the Committee, in establishing their standing (*see* note 2, *supra*), testified to a desire to engage in such activity. When this question was raised from the Bench at oral argument, counsel for the City responded, ". . . I suspect that the City's position would be, the city manager's position, the police chief's position would be, probably with the advise of the city attorney, would be that that was not the sort of thing that was prohibited by the Charter and personnel rules. But that's something that we haven't yet addressed." Under all these circumstances, we do not regard this question as being before us. We call attention, however, to *Hickman v. City of Dallas*, 475 F.Supp. 137 (N.D.Tex.1979), *aff'd mem.*, 634 F.2d 629 (5th Cir.1980), in which the court held invalid, as applied to a City of Dallas patrol officer who desired to become a candidate for the city council of the City of DeSoto within Dallas County, a provision of the Dallas City Charter prohibiting city employees from being candidates for "any elective public office within Dallas County." In *Hickman* the court also observed "[t]he potential for conflict when a city employee seeks office within the city may well be sufficient to justify a restriction on candidacy" and "[t]he provision in question might validly be used to restrict an employee's candidacy within the City of Dallas . . ." *Id.* at 141.

Carriers (see note 15, *supra*) apply as much to strictly state and local elections and political affairs as to elections for federal office and political activities attendant thereto. Thus, for example, the Hatch Act's prohibitions of federal employees publicly endorsing candidates or driving voters to the polls apply as fully to "off-year" elections for village constable as they do to elections for the United States Senate. Accordingly, the mere fact that restrictions on governmental employee political activity extend to elections for positions in governmental entities other than the entity imposing the restrictions on its employee does not of itself invalidate the restrictions. Nevertheless, the Hatch Act restrictions on federal employees are limited to partisan politics, and the political parties which operate at the federal level are generally the same ones which are significant at the state and local levels. This factor thus furnishes a nexus between the federal and the state and local politics as to which the Hatch Act restricts federal employee political activity. It is argued that in the present case no such comparable nexus exists, because the city elections are nonpartisan, while the other elections to which the Charter restrictions apply are partisan and thus unrelated to the City. This contention is not without force.

However, we conclude that while the case at bar does not present as close a nexus between the nonemployer elections and the affairs of the employer governmental entity imposing the restrictions on its employees as does the Hatch Act, nevertheless

such a nexus is not entirely lacking here. We believe it unrealistic to assume that politics within the geographical boundaries of a city are divided into completely unrelated watertight compartments of city and noncity politics. On the candidate and officeholder level, it is certainly not unheard of for a person prominent in local partisan politics, as a former officeholder or otherwise, to become a city councilperson in a nonpartisan election, or for a member of the nonpartisan city council to thereafter become a local, state, or even federal elective officeholder through the partisan political process. Moreover, significant operating relationships frequently exist within the geographical areas of a city, between the city government, whether partisan or not, and the county, state, and federal governments. City politics, then, whether or not "partisan," cannot be viewed as wholly divorced from the politics, within the area of the city, of the local, state, and federal governments.

Further, we note that the full range of Hatch Act prohibitions applies to state and local political activities, while the kinds of activities in which the Dallas City Charter prohibits its employees from engaging respecting noncity elections are much more limited than the Charter's prohibitions respecting city elections. Aside from the prohibitions against activities in uniform or in city buildings or on city time and against use of the prestige of city office, which are not challenged, the only prohibitions respecting noncity elections are those against soliciting funds and serving as campaign

manager. Here the rights of the city employees are less fundamental."

Finally, appellants' challenge to these portions of the Charter fails to recognize the considerable power wielded by public employees by virtue of their positions. Of necessity, individual governmental employees, as a practical matter, often have considerable discretion in the actual administration and enforcement of laws and the provision of governmental services. And, the timing, manner, and nature of the performance of such governmental functions in actual practice may frequently be subject to variation according to the attitudes of the governmental employees concerned. A Dallas private citizen might well be hesitant to refuse a political contribution or favor sought by a campaign manager or solicitor in a county, legislative or congressional campaign if the private citizen were dependent on that campaign manager or solicitor for fire or police protection or were subject to discretionary law or regulatory enforcement actions by that campaign manager or solicitor. Certainly the City has a legitimate interest in minimizing the exposure of its citizens to such pressures from city employees. And the Dallas private citizen is no less pressured simply because the election campaign for which the contribution or favor is sought by the city employee is for an office such as sheriff of Dallas County, or a local legislative or

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" Like running for office, *see Clements v. Fashing*, — U.S. —, —, 102 S.Ct. 2836, 2843, 73 L.Ed.2d 508, 516 (1982), managing a campaign, or soliciting and receiving funds on behalf of a candidate, are not truly fundamental rights, *See Letter Carriers*, 413 U.S. at 567, 93 S.Ct. at 2891.

congressional seat, rather than for a place on the Dallas city council."

[2] Accordingly, the City has a significant interest in limiting the activities of its employees in local "partisan" campaigns. While these interests are somewhat less extensive than those present in city council elections, the restrictions imposed are less onerous, and less fundamental employee rights are involved. Therefore, we uphold these provisions.

One further problem deserves our attention before we address the restrictions on contributions. The district court's invalidation of section 16(b)(1) regarding endorsements presented at nonpolitical gatherings applied only to individual employees, and not to their organizations. The Committee asserts that this ruling ignores its first amendment rights. These rights are derived from the individual members' associational and speech rights, *see Citizens Against Rent Control,* and from the public's right to free and uninhibited comment on political issues. *See Bellotti.* Although the district court failed to state why it reached different conclusions regarding Wachsman and the Committee, we perceive an appropriate distinction that justifies its order.

[3] The Committee must act through a spokesman. Regarding individual employees, the court was obviously concerned with limiting an employ-

" Likewise, city employees have an interest in not being subjected to political contribution or favor solicitation from their superiors who may be campaign managers or solicitors in such campaigns. *See Ex parte Curtis,* 106 U.S. 371, 1 S.Ct. 381, 27 L.Ed. 232 (1882).

ee's right to endorse a candidate at a private and/or nonpolitical gathering (*e.g.*, a Kiwanis Club meeting or a neighborhood barbecue). Such a setting suggests a public employee acting as a private citizen. This suggestion, however, does not fit a situation in which an official spokesman for an organization of city employees announces in that capacity the organization's endorsement of a particular city council candidate. The latter carries with it all the pernicious possibilities inherent in allowing individual employees to so address political gatherings. The arrival of an official spokesman bearing such an endorsement largely inbues a gathering with a political flavor. Indeed, the appellant Committee here is the avowedly political arm of the city employee police and firefighters organizations. Thus, the City's interests in prohibiting endorsements will be present in any situation in which an organization of city employees desires to make an endorsement. Therefore, the trial court's order in this regard is affirmed.[20]

CONTRIBUTIONS

[4] We address separately the trial court's decision regarding the City Charter's prohibition on contributions to city council candidates because the Hatch Act does not contain such a ban. To resolve this question, we invoke the test developed in *Morial* by Judge Goldberg, which he distilled from *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49

[20] We note that the lower court construed the Charter as prohibiting city employees and their organizations from releasing endorsements through any news medium. This invokes the same analysis as that applied to endorsements before political gatherings. It is a formal public endorsement and therefore can be validly restricted.

L.Ed.2d 547 (1976), *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), and *Letter Carriers, supra. See also Clements v. Fashing,* U.S. , 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982); *Citizens Against Rent Control, supra; Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); and *Bellotti, supra.*

> "The standard to be applied . . . is a function of the severity of impairment of first amendment interests. As the burden comes closer to impairing core first amendment values, . . . or impairs some given first amendment value more substantially, . . . the requisite closeness of fit of means and end increases accordingly. . . . [R]estrictions on the partisan political activity of public employees and officers, where such activity contains substantial nonspeech elements, . . . are constitutionally permissible if justified by a reasonable necessity . . . to burden those activities to achieve a compelling public objective." *Morial,* 565 F.2d at 300 (citations and footnote omitted).

Although the contribution ban affects a substantial first amendment right, we find it is reasonably necessary to achieve a compelling public objective.

Limitations on campaign contributions unquestionably involve substantial first amendment rights. These rights are primarily associational, *Buckley,* 424 U.S. at 21-25, 96 S.Ct. at 635-636, 637-638, although they also affect freedom of expression, *Id.* at 21, 96 S.Ct. at 635-636; *see also Citizens Against Rent Control,* 454 U.S. at 299, 102 S.Ct. at 439, 70

L.Ed.2d at 501, especially when the ban is absolute. In fact, since a total prohibition prevents the "symbolic expression of support evidenced by a contribution," *Buckley,* 424 U.S. at 21, 96 S.Ct. at 636, the City Charter limits employees' freedom of expression in the constitutionally sensitive area of political speech.

However, *Buckley does* hold that private citizen *candidate* contributions may be limited. And, we have noted the distinction for these purposes made between candidate elections and noncandidate, referenda type elections. *Citizens Against Rent Control, supra; Bellotti, supra; Let's Help Florida v. McCrary, supra.* We are dealing with contributions to candidate campaigns here, and while here there is a prohibition, rather than merely a limitation as in *Buckley,* in *Buckley* the limitation was across the board, both as to contributors and types of candidate elections, and here the only contribution restriction is that *city employees* are prohibited from contributing to *city council* elections.

In our view the City's interest in enacting this limited prohibition, preventing city council candidate election contributions by city employees, is undoubtedly compelling.

A century ago our Supreme Court, over but a single dissent, upheld the constitutionality of the act of Congress prohibiting federal employees from, among other things, "giving to . . . any other officer or *employee* of the government any money or property or other thing of value for political pur-

poses." *Ex parte Curtis,* 106 U.S. 371, 1 S.Ct. 381, 27 L.Ed. 232 (1882). We believe that for present purposes city employee contributions to the campaign of a city council candidate can be regarded much the same as contributions *to the candidate.* Further, in light of the considerations militating against having different rules respecting incumbents and challengers and the ever present possibility (in some instances, certainty) that the councilperson elected will not be an incumbent, we also conclude that the City Charter's prohibition in this respect is in no substantial sense subject to a stronger challenge than a prohibition against city employee contributions to city council members for their reelection efforts would be. Moreover, we note that the statute at issue in *Ex parte Curtis* extended to contributions for *any* political purpose, while here the prohibition is limited to contributions for candidate elections in which the winner will be, in a sense, the contributor's boss. Accordingly, we view *Ex parte Curtis* as being at the very least extremely persuasive if not actually controlling on the contribution issue here. Chief Justice Waite's forceful reasoning in that case bears repeating:

"A feeling of independence under the law conduces to faithful public service, and nothing tends more to take away this feeling than a dread of dismissal. If contributions from those in public employment may be solicited by others in official authority, it is easy to see that what begins as a request may end as a demand, and that a failure

to meet the demand may be treated by those having the power of removal as a breach of some supposed duty, growing out of the political relations of the parties. Contributions secured under such circumstances will quite as likely be made to avoid the consequences of the personal displeasure of a superior, as to promote the political views of the contributor—to avoid a discharge from service, not to exercise a political privilege." *Id.* at 373-74, 1 S.Ct. at 384-385.

Additionally, the City's prohibition on campaign contributions is designed to prevent "quid pro quo corruption between a contributor and a candidate," *Let's Help Florida v. McCrary, supra,* 621 F.2d at 199, as well as the appearance of undue influence. It guards both against less qualified employees being given favored assignments based on either their political contributions or their roles in an employee organization making such contributions, and against discrimination directed at qualified employees because they do not make or bring about such contributions. More generally, it prevents city council members from pressuring city employees, and prevents employees and their organizations from excessively or improperly influencing city council members or candidates. The latter also helps ensure that it does not appear to the public that political "insiders" have undue effect on council elections.

Having identified compelling governmental interests, we must consider whether the absolute ban is a reasonable necessity for achieving those ends.

Appellants rely on *Bruno v. Garsaud*, 594 F.2d 1062, 1064 (5th Cir. 1979), in which the Court, in dictum, expressed doubt that the state could constitutionally prohibit "employees, at least when acting as private citizens without any fanfare or publicity, from making contributions to a political candidate or party." These remarks, however, were directed to a statute prohibiting governmental employee contributions "for *any* political organization or purpose." *Id.* at 1063 n. 2 (emphasis added).[21] We share this doubt as applied to across-the-board bans. But here, while it is absolute, the ban is on contributions in a particular type of election, not all elections. It is directly tied to the City's interests. Simply limiting the allowable amount of a contribution would not prevent employees from being discriminated against or from attempting to achieve favor with council candidates. Moreover, a provision making it unlawful for council members to exploit public employees is not sufficient to achieve the City's interests. Not only does it fail to address the question of undue employee influence, it also does not provide full protection to employees. *See* note 16, *supra*.

One might argue that the City is protecting employees who do not wish to be protected.[22] This

[21] The statue would have prohibited, for example, a classified employee of the City of New Orleans from making a contribution to a city council election campaign in a small city at the other end of the state, or perhaps even from contributing to a referendum election campaign in such a distant place.

[22] However, note the following testimony at trial by the City's expert witness:

"Q. More government employees want to keep the Hatch Act than want to get rid of the Hatch Act?

"A. That's correct. I can demonstrate that both in terms of common knowledge and general text literature and also the polls that have been conducted at national level. I know of no polls at local level."

Other testimony indicated that many employees of the City of Dallas favored the restrictions. We do not suggest that the legal issues here are dependent on the outcome of polls; rather, such testimony is but further circumstantial confirmation that protecting employees is not merely a pretext of an unrealistic concern.

simply overlooks the general public's interest in an independent and efficient civil service. Appellants argue that upholding the lower court will make "political eunuchs" of city employees. However, this is simply not so, as the lower court's findings correctly demonstrate that the City leaves unregulated a considerable scope of city employee political activity. *See* note 3, *supra*. Rather than being emasculated, city employees are limited only to an extent that furthers their ability to perform optimally.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-1471

RICHARD WACHSMAN, ET AL.,
Plaintiffs-Appellants,

versus

CITY OF DALLAS, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Opinion May 2, 1983, 5 Cir., 198 , F.2d).

(JUNE 29, 1983)

Before CLARK, Chief Judge, GEE and GARWOOD, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

[s/ WILL GARWOOD]

United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

RICHARD WACHSMAN;
DALLAS POLICE & FIRE ACTION COMMITTEE,

Plaintiffs

v.

Civil Action No. CA-3-79-1372-*D*

CITY OF DALLAS; CHIEF, DALLAS POLICE DEPARTMENT; CHIEF, DALLAS FIRE DEPARTMENT,

Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Came on for trial on the merits on March 18, 1981, before the Court the above action of plaintiffs Dallas Police & Fire Action Committee (Committee) and Richard Wachsman (Wachsman). The Court, having heard the evidence at trial, and also having considered the evidence offered at the preliminary injunction hearing on December 20, 1979, and having considered the argument of counsel and the pre-trial memoranda of both parties and post-trial letters and briefs, makes the following findings of fact and conclusions of law.

Findings of Fact

1. The Committee, the political arm of the Dallas Police Association and the Dallas Professional Firefighters' Association, represents more than

3000 employees of defendant City of Dallas (City).

2. Wachsman is an employee of the Dallas Fire Department (Fire Department). He has worked for the Fire Department for approximately twenty years. He is a Committee member and a registered voter in Dallas.

3. The Committee and Wachsman sue defendant Chief of the Dallas Police Department and defendant Chief of the Fire Department in their official capacities only. (All defendants are referred to hereinafter collectively as "the defendants").

4. The Committee, as a committee and through its members, desires to endorse publicly city council candidates and organizations supporting such candidates, to support actively city council candidates and organization supporting such candidates, to circulate petitions for city council candidates, to contribute, directly or indirectly or through an organization, to city council candidates, and to solicit and to receive contributions for both city council candidates and partisan political candidates.

5. Wachsman also desires to endorse publicly city council candidates and organizations supporting such candidates, to support actively city council candidates and organizations supporting such candidates, to circulate petitions for city council candidates, to contribute, directly or indirectly or through an organization, to city council candidates, and to solicit and to receive contributions for both

city council candidates and partisan political candidates; in addition, Wachsman desires to manage a partisan political campaign.

6. The City has not instituted a firemen's and policemen's civil service system pursuant to Tex. Rev. Civ. Stat. Ann. art. 1269m (1969 and Supp. 1978).[1]

7. Prior to 1973 the City imposed no restrictions on the political activity of its police and its firefighters.

8. Section 16(a) of Chapter XVI of the City Charter provides in part:

> No person shall be appointed, reduced, removed, or in any way favored or discriminated against because of . . . political . . . opinions or affiliations. No officer or employee of the city shall directly or indirectly, in any way be required to contribute to

[1] Tex. Rev. Civ. Stat. Ann. art. 1269m(22) (Supp. 1978) details the restrictions which a city that has instituted a firemen's and policemen's civil service system may place on the political activities of its firemen and policemen:

> Employees in the Fire Department or Police Department shall not be permitted to take an active part in any political campaign of another for an elective position of the city if they are in uniform or on active duty. The term active part means making political speeches, passing out cards, or other political literature, writing letters, signing petitions, actively and openly soliciting votes and making public derogatory remarks about candidates for such elective positions.
>
> Firemen and Policemen coming under the provisions of this Act are not required to contribute to any political fund or render any political service to any person or party whatsoever; and no person shall be removed, reduced in classification or salary, or otherwise prejudiced by refusing to do so; and any official of any city coming under the provisions of this Act who attempts the same shall be guilty of violating the provisions of this Act.
>
> . . . Provided however, that no Civil Service Commission or governing body of any city shall further restrict the rights of employees of the Police and Fire Departments to engage in political activities except as herein expressly provided

> any political campaign, political party, organization which supports candidates for public office, or for any partisan political purpose whatsoever.

See Plaintiffs' Exhibit 1 at preliminary injunction hearing.

9. Sections 16(b) and 16(c) of Chapter XVI of the City Charter (Sections 16(b) and 16(c)) provide:

> (b) To avoid undue influence of city employees on the outcome of city council elections and to avoid undue influence of city councilmen or candidates for city council on city employees, the following restrictions are imposed:
>
> (1) No employee of the city or association of such employees may publicly endorse or actively support candidates for the city council or any political organization or association organized to support candidates for the city council;
>
> (2) No employee of the city may circulate petitions for city council candidates, although he may sign such a petition;
>
> (3) No employee of the city may contribute, directly or indirectly or through an organization or association to such a campaign nor solicit or receive contributions for a city council candidate;
>
> (4) No employee of the city may wear city council campaign buttons nor distribute campaign literature at work or in a

city uniform or in the offices or buildings of the City of Dallas.

(c) In elections other than for city council of the City of Dallas, an employee of the city may not:

(1) Use the prestige of his position with the city for any partisan candidate;

(2) Manage a partisan political campaign;

(3) Solicit or receive contributions for such a campaign;

(4) Actively support a candidate except on his own time while not in a city uniform nor in an office or building of the City of Dallas. (Amend. of 6-12-73, Prop. No. 32)

See Plaintiffs' Exhibit 1 at preliminary injunction hearing. The City may discipline employees if they engage in political activity proscribed by Sections 16(b) and 16(c).

10. Plaintiffs do not challenge Sections 16(b)(4), 16(c)(1), and 16(c)(4).

11. City Ordinance No. 15434, as amended by City Ordinance No. 16105, *see* Plaintiffs' Exhibit 5 at preliminary injunction hearing, limits the amount which an individual or a committee can contribute to a city council candidate to $500.

12. The restrictions contained in Sections 16(b) and 16(c) are not aimed at particular groups or points of view, but apply equally to all partisan and nonpartisan activities of the types described.

They discriminate against no racial, ethnic or religious minorities. Nor do they seek to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls.

13. The City Charter does not prohibit Wachsman and the Committee's other members from privately or publicly expressing their views on political subjects, from campaigning in connection with referenda,[2] from privately endorsing or expressing their support for city council candidates, from signing petitions in support of city council candidates, or from voting in both city council and partisan elections. Moreover, the City Charter does not prohibit the Committee, the Committee's members, or Wachsman from contributing to partisan candidates, or from publicly endorsing or actively supporting partisan candidates while not on duty, in uniform, or in a City office or building.

14. The City will provide Wachsman and the Committee with a limited form of preconduct review. See Plaintiffs' Exhibits 6-8 at preliminary injunction hearing.

15. In addition, by way of an amended answer filed in this cause on March 18, 1981, the contested issues in this action were narrowed considerably. The defendants now admit that the following activities are permitted by sections 16(b) and 16(c):

---

[2] Both individual policemen and the Committee campaigned actively and successfully in support of a recent referendum concerning a 15 percent pay increase for police and firefighters.

(A) city employees may place city council campaign signs in their yards and on the premises of their homes,

(B) city employees may place bumper stickers on the vehicles which they own,

(C) the spouses of city employees may contribute to the campaign of a city council candidate and may solicit and receive contributions for a city council candidate,

(D) the spouses of city employees, and associations and organizations of spouses of city employees, may publicly endorse and actively support city council candidates,

(E) the spouses of city employees, and associations and organizations of spouses of city employees, may circulate petitions for city council candidates,

(F) city employees may work in campaign headquarters of city council candidates, and

(G) an association or organization of city employees may mail or otherwise distribute endorsements of city council candidates to the city employee members of such organization or association

16. The City contends that the following activities are still prohibited by Sections 16(b) and 16(c).

(A) the making of contributions by city employees or by associations or organizations of city employees to a city council campaign,

(B) the solicitation or receipt of contributions by city employees or by associations or organizations of city employees for city council candidates, or for partisan political campaigns,

(C) The releasing for publication through any news medium by a city employee or by an association or organization of city employees of an endorsement of a city council candidate,

(D) the circulation of petitions for a city council candidate by city employees or by associations or organizations of city employees, and

(E) the managing of a partisan political campaign by a city employee.

17. The City has established these prohibitions on participation in city council elections in an effort to present city employees from being pressured into such participation because such pressures can adversely effect moral and efficiency. *See* Section 16(b). The City employees might reasonably fear retaliation for failing to support or contribute to a city council candidate if there is no prohibition on their not participating in these activities; incumbent city councilpersons could gain an unfair political advantage if city employees were not prohibited from participating in city

council elections; and, political favoritism or the appearance of political favoritism could result from the city employees participating in city elections.

18. The fear of political retaliation would materially interfere with the City's ability to recruit and maintain an efficient and impartial city work force.

19. Wachsman and the Committee desire to participate or engage in all prohibited activities. *See* Finding of Fact No. 15.

20. In particular, Wachsman and the Committee desire to endorse city council candidates publicly and without fan fare, by means other than political advertisement, political broadcast, or political campaign literature; and at places other than political conventions, political caucuses, or political rallies.

21. The City elections are nonpartisan, as are the offices.

22. The City utilizes the Council-Manager form of city government. The eleven-member council appoints a city manager who serves as the chief administrative and executive officer of the city. The City Charter, CH. VI, §1. The appointment is to be made solely on the basis of executive and administrative training, experience and ability, and without regard to political consideration. *Id.* The city manager has ultimate authority to hire and fire employees of the City, with minor exception; The city council, and its members are prohibited from

dictating or attempting to dictate the appointment of any person to, or his removal from, office or employment by the city manager or any of his subordinates. *Id.*, Ch. III, §15. Willful violation of this provision can resule in the removal of a city council member. *Id.* at §16. With only minor exception, city council members are prohibited from any direct personnel relationship with city employees. It is a violation of the Dallas Charter for any person to discriminate against a city employee because of political affiliations. *Id.* at Ch. XVI, §16(a).

23. Pierson McMillan Ralph (Ralph), Director of Personnel for the City of Dallas, interprets Sections 16(b) and 16(c) to prohibit employees of the City from stating to a general audience a position in favor of or against a particular candidate or in favor of or against a particular proposition. This prohibition encompasses both oral endorsements and written statements. Ralph's interpretation would prohibit Wachsman from endorsing a city council candidate to any group consisting of more than 15 people. Ralph is the final authority who speaks for the City on personnel matters unless overruled by the city manager or city council.

Conclusions of Law

1. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§1343(3) and 1343(4).

2. The First Amendment protects the conduct in which Wachsman and the Committee wish to

engage. Specifically, the First Amendment's guarantees of freedom of expression and association encompass the right to endorse political candidates publicly, *see Mills* v. *Alabama,* 384 U.S. 214, 218 (1966), the right to support political candidates actively, the right to circulate nominating petitions, the right to manage a political campaign, the right to contribute to both individual candidates and political organizations, *Buckley v. Valeo,* 424 U.S. 1, 14-23 (1976), and the right to solicit and to receive funds for political candidates and organizations.

3. However, the City has interests "in regulating the conduct and 'the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general'." *U.S. Civil Service Commission v. National Association of Letter Carriers* (*Letter Carriers*), 431 U.S. 548, 564 (1973), *quoting Pickering v. Board of Education,* 391 U.S. 563, 568 (1968). The City has compelling interests in minimizing corruption and political favoritism in the city civil service, in assuring the effective and impartial administration and execution of federal, state, and city laws and programs, in preserving the appearance of effective and impartial administration of such laws and programs, in increasing city employees' sense of job security, and in limiting "the political influence of (city) . . . employees on others and on the electoral process. . . ." *Letter Carriers, supra* at 557. In addition, the City has a compelling interest in keeping partisan politics out

of city council elections because partisan politics may exacerbate any existing problems of corruption, political favoritism, and apparent partiality in the administration of laws and the execution of governmental programs.

4. The prohibitions contained in Sections 16(b) and 16(c) are facially neutral and non-discriminatory. *See* Finding of Fact 12, *supra*; *Letter Carrier, supra* at 564.

5. *In Broadrick v Oklahoma,* 413 U.S. 601 (1973), and *Letter Carriers, supra,* the Supreme Court did not foreclose the possibility that a city may constitutionally restrict its employees' activities in the nonpartisan political arena. *See, Magill v. Lynch,* 560 F.2d 22 (1st Cir. 1977), *cert. denied,* 434 U.S. 1063 (1978); *Morial v. Judiciary Commission,* 565 F.2d 295 (5th Cir. 1977) (en banc), *cert. denied,* 435 U. S. 1013 (1978) (state may constitutionally require judge to resign prior to announcing candidacy in nonpartisan election).

6. Although *Letter Carriers'* language is restrictive in that it deals only with restrictions on partisan political activity, this restrictive language does not require courts to ignore the reality of partisanship even where the formality of party affiliation is absent. *Morial, supra* at 303 n.8. "In any given case, the relevant inquiry must be whether the threat to the state's interests in the impartiality of its public servants stems from party involvement or from political involvement." *Id.* The City's restrictions stem from a concern that the pressures

excerted by factions which form around an individual candidate or by the candidates or elected officials themselves can be as detrimental to the public interest as pressures brought on by partisan party politics. This concern arises despite the protections the City Charter affords regarding a city employee's political activities. *See* Finding of Fact 17, 18, and 22, *supra*.

7. The City's restrictions on the public endorsement of city council candidates and on private, voluntary contributions to city council candidates infringe on more fundamental First Amendment freedoms than the City's restrictions on circulation of petitions for city council candidates, solicitation and receipt of contributions for both city council and partisan candidates, and management of partisan political campaigns.

8. The nonpartisan political activities in which Wachsman and the Committee wish to engage pose a greater threat to the City's interests, *see* Conclusion of Law 3, *supra,* than the partisan political activities in which they wish to engage.

9. In assessing whether the City has arrived at a proper "balance between the interests of the (employee), as a citizen, in commenting upon matters of public concern and the interest of the (government), as an employer, in promoting the efficiency of the public service it performs through its employees," *Letter Carriers, supra at* 564, *quoting Pickering v. Board of Education, supra* at 568, the Court must examine "the closeness of fit" between

the City's interests and the restrictions on its em-employees' political activities. *Morial v. Judiciary Commission, supra* at 300. "The requisite closeness of (fit) . . . must be determined on a case-by-case basis. The standard to be applied in any case is a function of the severity of (the) impairment of first amendment interests. As the burden comes closer to impairing core first amendment values . . . or impairs some given first amendment values more substantially, . . . the requisite closeness of fit of means and end increases accordingly." *Id.* The City may impose restrictions reasonably necessary to achieve its compelling objectives upon its employees' political activity that contains substantial non-speech elements. *Id.* However, restrictions on political activities that more closely resemble pure speech must pass more stringent judicial scrutiny. *Cf. Elrod v. Burns,* 427 U.S. 347, 361-65 (1976) (restriction must be least restrictive means available to achieve vital governmental interest).

10. The City has established a form of pre-conduct review which provides Wachsman and the Committee with an avenue by which they may resolve their doubts about the meaning and the scope of Sections 16(b) and 16(c) without first running the risk of incurring disciplinary sanctions. *See* Finding of Fact 14, *supra*; *Letter Carriers, supra* at 580.

A. Contributions

11. The prohibition on campaign contributions by both City employees and associations or organiza-

tions of City employees implicates fundamental First Amendment interests. *Buckley v. Valeo,* 424 U.S. 1, 23 (1974).

13. The prohibitions on campaign contributions of Section 16(a)(3) do not violate Wachsman and the Committee's First Amendment rights, and, therefore, they are constitutional.

B. Public Endorsement

14. Section 16(b)(1) has been interpreted by the City to prohibit City employees or associations of City employees from releasing for publication through any news medium an endorsement of a city council candidate. *See* Finding of Fact 16(c), *supra.*

15. This prohibition is not overly broad or vague and is narrowly tailored to fulfill the City's vital interest.

16. The City's interpretation of Section 16(b)(1) does not violate Wachsman's and the Committee's First Amendment rights, and, therefore, is constitutional.

17. Ralph as spokesman for the City, *see* Finding of Fact 23, has interpreted Section 16(b)(1) to prohibit a city employee from endorsing a city council candidate to any group of more than 15 people. *See* Finding of Fact 23, *supra.* Although, the City could constitutionally prohibit a city employee from "[a]ddressing a convention, caucus, rally, or similar gathering or political party in sup-

port of or in opposition to a partisan candidate for public office or political party office; . . . ," *Letter Carriers, supra* at 817, the broad prohibition articulated by Ralph is not necessary to fulfill the City's vital interest and encompasses clearly protected activities. In addition, as applied to Wachsman, *see* Finding of Fact, 20 *supra,* this interpretation unconstitutionally infringes upon his right to express his opinion as an individual privately and publicly on political subjects and candidates. *See Letter Carriers, supra,* at 820. *Cf. Broadrick v. Oklahoma,* 413 U.S. 601, 617-18 (1973) (Oklahoma statute regulating state employees political activities upheld because it was construed so as to prohibit "private" political expression only when such expression was made within the context of active partisan political campaigning). Therefore, this interpretation of Section 16(b)(2) is overbroad and unconstitutionally infringes on Wachsman's First Amendment Rights. But, this interpretation is not unconstitutional as applied to the Committee.

C. Circulation of Petitions and Solicitation and Receipt of Contributions

18. Sections 16(b)(2) prohibits the circulation of petitions by City employees or associations or organizations of City employees, and 16(b)(3) prohibits such an employee or such an association or organization from contributing to a campaign and from soliciting or receiving contributions for a council candidate.

19. These restrictions are narrowly tailored to fulfill the City's vital interests.

20. These restrictions do not unconstitutionally infringe upon Wachsman's and the Committee's First Amendment rights. *See Letter Carrier,* supra, at 556.

D. Partisan Political Campaigns

21. The City's restrictions on its employees' activities in partisan political campaigns, *see* Sections 16(c)(2) and 16(c)(3), are constitutional because they are reasonably necessary to achieve a combination of compelling public objectives.

E. Attorney's Fees

22. Wachsman and the Committee are "prevailing parties" under the provisions of 42 U.S.C. §1988, and are entitled to the recovery of attorney's fees as costs, the amount of which, if the parties are unable to stipulate to, will be determined at a subsequent hearing. *See Iranian Students Association v. Sawyer,* Slip op. No. 79-3333 (5th Cir. March 16, 1981).

23. Any finding of fact deemed a conclusion of law is so adopted, and any conclusion of law deemed a findings of fact is so adopted.

Dated this 3rd day of April, 1981.

[s/ ROBERT M. HILL]

United States District Judge